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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
CURRY COUNTY,)
)
Respondent,)
)

LUBA No. 95-160
FINAL OPINION
AND ORDER

Appeal from Curry County.

Celeste Doyle, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Theodore R. Kulongoski, Attorney General; Thomas A. Balmer, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

No appearance by respondent.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

REMANDED 01/10/96

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a
4 comprehensive plan amendment and zone change, and a
5 Statewide Planning Goal 2 exception to Goals 3 and 4.

6 **FACTS**

7 The owner of a 65-acre parcel applied to the county for
8 a comprehensive plan and zoning map amendment to change the
9 comprehensive plan designation of the property from "Forest
10 Grazing" to "Rural Residential" and to rezone the subject
11 property from Forestry Grazing to Rural Residential 5. The
12 request also included a Goal 2 exception to Goals 3 and 4,
13 based on the property being irrevocably committed to uses
14 not allowed by Goals 3 and 4.

15 According to the county, the property is almost
16 entirely forested with a mixed stand of conifer, deciduous
17 trees and underbrush, and has moderate to steep slopes. The
18 property is vacant and undeveloped, except for four water
19 storage tanks in the southwest corner, and water, power and
20 telephone lines, all incidental to existing and planned
21 rural residential development to the west. Although the
22 county found the property has never been used for resource
23 uses, the record reflects that the property was logged in
24 1992. The property is bordered to the west and southwest
25 by seven ocean-front rural residential parcels. According
26 to the county staff report for the subject application,

1 these parcels were partitioned from the subject parcel for
2 rural residential development determined not to interfere
3 with forest use of the subject property. As part of one or
4 more of these partitions, the property owner submitted a
5 forest management plan for the remaining (subject) property.

6 To the north of the property is a parcel zoned Forest
7 Grazing and Rural Commercial, which is developed with a
8 tourist attraction known as the Prehistoric Gardens. South
9 of the property is a more than 100-acre parcel, zoned Forest
10 Grazing, which, according to the county, is ranch land used
11 for cattle grazing. Highway 101 borders the property to the
12 east. East of Highway 101 is an approximately 150 acre
13 site, also zoned Forest Grazing, which according to the
14 county, is "in use for forestry and also has residential
15 dwellings." Record 9.

16 This appeal follows the board of commissioners'
17 approval of the application.

18 **DISCUSSION**

19 Petitioner makes one assignment of error: that the
20 county has not demonstrated that the proposed exception site
21 is irrevocably committed to uses not allowed by Goals 3 and
22 4, as required by OAR 660-04-028. Petitioner contends the
23 county's findings misapply the Goal 2 exceptions
24 requirements; do not adequately establish the parcel cannot
25 be used for commercial forestry uses; and are not based on
26 substantial evidence in the whole record.

1 **A. Misapplication of Irrevocably Committed Exception**
2 **Requirements**

3 The standards for an irrevocably committed exception to
4 allow rural residential development of lands subject to
5 Goals 3 and 4 are set out in ORS 197.732(1)(b), Goal 2, Part
6 II(b) and OAR 660-04-028. Under the statute, goal and rule,
7 an irrevocably committed exception requires that "existing
8 adjacent uses and other relevant factors make uses allowed
9 by the applicable goal impracticable. * * *" In addition,
10 under OAR 660-04-028(6)(c)(A), a previous goal exception
11 cannot be the basis upon which to grant additional
12 exceptions. That rule provides:

13 "Past land divisions made without application of
14 the Goals do not in themselves demonstrate
15 irrevocable commitment of the exception area.
16 Only if development (e.g., physical improvements
17 such as roads and underground facilities) on the
18 resulting parcels or other factors make unsuitable
19 their resource use or the resource use of nearby
20 lands can the parcels be considered to be
21 irrevocably committed. Resource and nonresource
22 parcels created pursuant to the applicable goals
23 shall not be used to justify a committed
24 exception. For example, the presence of several
25 parcels created for nonfarm dwellings or an
26 intensive commercial agricultural operation cannot
27 used to justify a committed exception for land
28 adjoining those parcels."

29 Petitioner contends the county misapplied the
30 applicable law by basing its conclusion that the property is
31 irrevocably committed to non-resource uses on the existence
32 of non-resource residential parcels created pursuant to the
33 applicable goals.

1 The county's findings acknowledge that, because the
2 non-resource parcels to the west were created pursuant to
3 the applicable goals, they cannot be used to justify an
4 exception for the subject parcel. Notwithstanding that
5 acknowledgment, however, the county's conclusion that the
6 property is irrevocably committed to non-resource uses is
7 based primarily on its proximity to the seven parcels to the
8 west and southwest, which were partitioned from the subject
9 resource property for rural-residential development. The
10 applicant's proposed findings, adopted by the county as its
11 own, state:

12 "This land was at one time part of the subject
13 property. The land has since been partitioned for
14 residential use as non-resource. I realize as per
15 Section (6)(c)(A) of this rule, non-resource
16 parcels shall not be used to justify a committed
17 exception. However, I believe the characteristics
18 of the land which allowed them to be created is
19 crucial to these findings." Record 17.

20 The findings then note that the soils on the adjacent
21 non-resource parcels cannot grow trees, that the land is
22 served by a non-community water system, that underground
23 utilities, including water, phone and electricity, are in
24 place, that there are eight septic systems in place, that
25 there are ten dwellings approved and one developed; and that
26 the residential road system "is the only practicable access
27 to the subject property."¹ Record 16. As these residential

¹The scope of the "residential road system" to which the county refers is unclear. It appears that three private roads, off Highway 101, border

1 parcels relate to the subject property, the county finds:

2 "All utilities crucial to the residential use
3 south and west of the subject property go through
4 the subject property. The most obvious is [sic]
5 the water lines which traverse the east, south and
6 west portion of the subject property. Also, the
7 power and phone lines through the north portion of
8 the subject property is [sic] the only source of
9 utilities to the residential use northwest of the
10 subject property." Record 18.

11 These findings do not establish how these facts are
12 relevant to the characteristics of the subject property.
13 They address only how the applicant's development of
14 adjacent non-resource parcels, created pursuant to the
15 applicable goals, affects resource use of the subject
16 property. OAR 660-04-028(6)(c)(A) specifically precludes
17 reliance on those other parcels to justify the requested
18 exception. The existence of those adjacent parcels, created
19 pursuant to the applicable goals, cannot now be used as the
20 basis for concluding that resource use of the subject
21 property is impracticable.

22 The county has misapplied the applicable law in relying
23 on the existence of the non-resource parcels west of the
24 subject parcel to justify an exception for that parcel.

the site to the west and south. The county does not explain how this road system was created or why this road system is the most practicable access to the subject parcel. Nor does it make findings to establish that these private roads provide the sole access to the property. Rather, the county also determines in other findings that the property cannot be accessed from two of the private roads to the west and south because of deed restrictions and road conditions.

1 **B. Inadequacy of Findings**

2 Petitioner contends the county's findings are
3 inadequate in their justification for a Goal 3 exception,
4 and in their evaluation of the practicability of non-
5 commercial and commercial forestry uses on the subject
6 property.

7 **1. Goal 3 Exception**

8 The Forest Grazing plan designation is a combined
9 forest/farm designation. Consequently, Goal 2 exceptions
10 must be taken to both Goals 3 and 4. The county recognized
11 this necessity, and purported to take exceptions to both
12 goals. However, with regard to Goal 3, the county found
13 only as follows:

14 "The subject property is presently zoned F.G.
15 which includes Goal 3, Agricultural land, and Goal
16 4, Forest land. The subject property has never
17 been in agricultural use. The soils V1e, do not
18 fall into Goal 3 definition of Agricultural land."
19 Record 15.

20 Because the property is located in a combined
21 agricultural and forest zone, an irrevocably committed
22 exception must establish that all uses allowed by both Goals
23 3 and 4 are impracticable. This sole finding regarding Goal
24 3 is inadequate to establish that all uses allowed by Goal 3
25 are impracticable on the subject site.

26 **2. Failure to Address Goal 4 Uses other than**
27 **Commercial Forestry**

28 Petitioner also challenges the county's findings
29 regarding its Goal 4 exception because the findings address

1 the practicability of commercial forestry uses only, and do
2 not address the other commercial and noncommercial uses
3 allowed by Goal 4.

4 To justify an irrevocably committed exception, the
5 county must establish that all uses allowable under the
6 applicable goals are impracticable. In addition to the
7 inadequacy in its findings regarding Goal 3, even if the
8 county could establish the impracticability of the property
9 for commercial forestry uses, the county's failure to
10 consider uses other than commercial forestry uses renders
11 its findings inadequate. See OAR 660-04-028; DLCD v. Coos
12 County, 29 Or LUBA 415 (1995); DLCD v. Curry County, 26 Or
13 LUBA 34 (1993).

14 **2. Commercial Forestry Use**

15 Petitioner additionally argues the county has not
16 established that commercial forestry use is impracticable.

17 As we have previously explained, the impracticability
18 standard for committed exceptions is a demanding standard,
19 and findings must do more than recite facts addressing the
20 relevant factors. The findings must explain why the facts
21 upon which it relies lead to a conclusion that uses allowed
22 by the goals are impracticable. 1000 Friends of Oregon v.
23 Yamhill County, 27 Or LUBA 508 (1994); DLCD v. Josephine
24 County, 18 Or LUBA 88 (1989).

25 As evidence that commercial forestry use on the
26 property is, in fact, practicable, petitioner cites the fact

1 that the property was commercially logged in 1992. The
2 county did not address the 1992 logging. As a threshold,
3 the county's findings are inadequate for failure to address
4 the 1992 logging in relation to the practicability of use of
5 the property for commercial forestry. The county's findings
6 are additionally inadequate for their failure to relate
7 facts regarding the subject and adjoining parcels to its
8 conclusions.

9 **a. Highway 101**

10 The county relies on the location of Highway 101, which
11 borders the property to the east, to conclude commercial
12 forestry use of the property is impracticable. The findings
13 do not explain why the presence of Highway 101 precludes
14 such resource use, with the exception of a single finding
15 that a scenic buffer limits harvesting of trees adjacent to
16 the highway. The findings do not explain how that scenic
17 buffer precludes commercial forestry use of the entire
18 property. Although OAR 660-04-228(6)(e) provides that
19 man-made features such as roads may constitute impediments
20 to resource use, the existence of such man-made features
21 does not automatically preclude resource use. A scenic
22 buffer along the property's eastern boundary does not
23 necessarily make resource use of the entire site
24 impracticable. The county has not adequately explained its
25 basis for concluding that Highway 101 renders the use of the
26 property for resource use impracticable.

1 **b. Other adjacent uses**

2 The subject property and the two larger parcels to the
3 east and south are all zoned Forest Grazing. The county's
4 findings conclude, but do not explain why, use of those
5 adjoining parcels makes resource use of the subject property
6 impracticable. Rather, the county concludes that, since
7 none of the adjoining parcels has uses, topography or
8 characteristics similar to the subject property, those
9 parcels cannot be aggregated with the subject property for
10 resource uses. The county further concludes that the
11 existence of dissimilar uses on those parcels renders
12 resource use of the subject property impracticable.

13 It is not relevant to the required evaluation for an
14 irrevocably committed exception whether the adjacent parcels
15 are used for purposes similar to the subject parcel. The
16 inquiry that the county must make is whether existing uses
17 on these other parcels makes uses allowed by Goals 3 or 4
18 impracticable on the subject parcel. To the extent uses are
19 dissimilar, the county has not established how, if at all,
20 that dissimilarity could make resource use of the subject
21 property impracticable. With regard to the Prehistoric
22 Gardens site to the north, zoned Forest Grazing and Rural
23 Commercial, the county summarily concluded, "[a] more
24 compatible zoning, i.e., R.R. 10 would prevent conflicts

1 with the R.C. zone to the north." Record 16.² To the
2 extent there are conflicts, the county has not explained the
3 nature and source of those conflicts, or explained how those
4 conflicts render resource use of the subject property
5 impracticable.

6 The county has not conducted the analysis required for
7 an irrevocably committed exception.³

8 **C. Substantial Evidence**

9 Petitioner also contends the county's findings lack
10 substantial evidence in the record. Because the county's
11 findings are inadequate and misapply the applicable law, no
12 purpose would be served to further evaluate the evidence
13 upon which they are based.

14 The county's decision is remanded.

²The county approved the request for a zone change to RR-5. The reference in the findings to a more "compatible" zone being RR-10 is unclear.

³The county purports to take an irrevocably committed exception. However, it also makes some findings to justify a physically developed exception. The physical development upon which the county relies is infrastructure development surrounding the subject property incidental to the rural residential development. The findings do not establish that the subject property itself is physically developed.